Supreme Court U.S.

No. ——— 99 266 AUG . 3 1999

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IN THE

Supreme Court of the United States

COOK COUNTY, ILLINOIS,
Petitioner,

v.

JANET CHANDLER, Ph.D.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a municipal entity is immune from suit under the False Claims Act, 31 U.S.C. § 3729, where the mandatory treble damages and fines prescribed therein are punitive but Congress did not specifically abrogate municipal immunity from the False Claims Act's punitive remedy.

2. Whether, under the collateral order doctrine, a local government has the right to take an immediate appeal of a district court's denial of a motion to dismiss on the ground of municipal immunity from a False Claims Act suit.

LIST OF PARTIES

The parties to the proceeding below were petitioner/defendant, Cook County Illinois, petitioner's co-defendant, Hektoen Institute For Medical Research, and respondent/plaintiff, Janet Chandler, a *qui tam* relator under the False Claims Act. The United States, while listed as a plaintiff, declined to intervene in this case and did not participate in the issues raised in this petition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT	5
I. BACKGROUND	5
II. PROCEEDINGS BELOW	6
REASONS FOR GRANTING THE WRIT	8
I. RESOLUTION OF THE CONFLICT IN THE CIRCUITS IS CRITICAL TO THE ISSUE OF MUNICIPAL IMMUNITY FROM A FALSE CLAIMS ACT SUIT	11
A. The Circuits Are Split As To Whether The FCA's Mandatory Treble Damage Remedy Is Punitive	11
B. The Circuits Are Split As To The Scope Of A Suable "Person" Under 31 U.S.C. § 3729	16
C. Resolution Of The Issue Of Municipal Immunity From An FCA Suit Is Critical To Local Governments	17

TABLE OF CONTENTS—Continued

Page

II. A LOCAL GOVERNMENT'S IMMUNITY FROM SUIT UNDER THE FCA SHOULD BE DECIDED IN THE FIRST INSTANCE BECAUSE SUBJECTING A LOCAL GOVERNMENT TO PROTRACTED DISCOVERY AND TRIAL BEFORE DECIDING THE IMMUNITY ISSUE IS COSTLY AND DISRUPTIVE AND, IN THIS CASE, IMPLICATES NONPARTIES AND THEIR CONFIDENTIAL SUBSTANCE ABUSE TREATMENT RECORDS 22

CONCLUSION 25

APPENDIX 1a

TABLE OF AUTHORITIES

CASES — Page

Barnier v. Szentmiklosi, 810 F.2d 594 (6th Cir. 1987) 14
Carr v. Alleghany Health, Educ. & Research Found., 933 F. Supp. 485 (W. D. Pa. 1996) 20
City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S. Ct. 2748 (1981) 13, 14, 15, 16
Genty v. Resolution Trust Corp., 937 F.2d 899 (3d Cir. 1991) 15
Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727 (1982) 22, 23, 24
Hunt v. City of Boonville, 65 Mo. 620 (1877) 13
Local 738, Int'l Bhd. of Teamsters v. Certified Grocers Midwest, Inc., 737 F. Supp. 1030 (N.D. Ill. 1990) 20
Massey v. City of Oklahoma, 643 F. Supp. 81 (W.D. Ok. 1986) 15
Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806 (1985) 23, 24
Nixon v. Fitzgerald, 457 U.S. 731, 102 S. Ct. 2690 (1982) 22, 23
Owen v. City of Independence, Mo., 445 U.S. 622, 100 S. Ct. 1398 (1980) 13, 16
Pelfresne v. Village of Rosemont, 22 F. Supp. 2d 756 (N.D. Ill. 1998) 15
Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 101 S. Ct. 2061 (1981) 13
United States v. Bornstein, 423 U.S. 303, 96 S. Ct. 523 (1976) 11, 12
United States v. Brekke, 97 F.3d 1043 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1281 (1997) 9, 12
United States v. Halper, 490 U.S. 435, 109 S. Ct. 1892 (1989) 11
United States ex rel. Janet Chandler, Ph.D. v. The Hektoen Institute For Medical Research, et al., 1999 U.S. Dist. LEXIS 589 (N.D. Ill. January 7, 1999) 8
United States ex rel. Devlin v. County of Merced, 1996 U.S. App. LEXIS 17681 (9th Cir. July 11, 1996) 18

TABLE OF AUTHORITIES—Continued

Page

United States ex rel. Dunleavy v. County of Delaware, 123 F.3d 734 (3d Cir. 1997) 18, 19
United States ex rel. Garibaldi v. Orleans Parish Sch. Bd., 46 F. Supp. 2d 546 (E.D. La. 1999) 19, 20
United States ex rel. Graber v. City of New York, 8 F. Supp. 2d 343 (S.D.N.Y. 1998) ..... *passim*
United States ex rel. Lamers v. City of Green Bay, 168 F.3d 1013 (7th Cir. 1999) 18
United States ex rel. Long v. SCS Business and Technical Inst., 173 F.3d 870 (D.C. Cir. 1999) .. 9, 12, 15, 17
United States ex rel. Marcus v. Hess, 317 U.S. 537, 63 S. Ct. 379 (1943) 12, 13
United States ex rel. Mistick PBT and Mistick PBT v. Housing Auth. of Pittsburgh, 1999 U.S. App. LEXIS 17935 (3d Cir. July 30, 1999) 18
United States ex rel. Stevens v. Vermont Agency of Natural Resources, 162 F.3d 195 (2d Cir. 1998), *cert. granted*, 67 U.S.L.W. 3784 (1999) .. 9, 10, 12, 17
United States ex rel. Zissler v. Regents of the University of Minnesota, 154 F.3d 870 (8th Cir. 1998) 9, 10, 12, 17

STATUTES AND OTHER AUTHORITY

28 U.S.C. § 1291 ..... 8, 23
31 U.S.C. § 3729 ..... *passim*
31 U.S.C. § 3730 ..... 11, 12
42 U.S.C. § 290dd-2 ..... 7, 20, 21
42 U.S.C. § 1983 23
42 C.F.R. § 2.3 7
42 C.F.R. § 2.13 7
735 ILCS 5/8-802 7
735 ILCS 5/8-2105 7
H.R. Rep. No. 92-920, 92nd Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 2045, 2072 21

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Cook County, Illinois ("Cook County"), respectfully petitions for a writ of certiorari to review the dismissal order of the United States Court of Appeals for the Seventh Circuit and the underlying decision of the United States District Court for the Northern District of Illinois.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Seventh Circuit dismissing the appeal is unreported and is reproduced in the Appendix at 1a. The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois for review is reported as *United States of America ex rel. Janet Chandler, Ph.D. v. The Hektoen Institute For Medical Research, et al.*, 35 F. Supp. 2d 1078 (N.D. Ill. 1999), and is reproduced in the Appendix at 3a.

JURISDICTION

The Order dismissing the appeal by the United States Court of Appeals for the Seventh Circuit was entered on May 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

§ 3729. False claims

(a) Liability for certain acts.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating

this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim defined.—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. § 3729 (1994).

STATEMENT

I. BACKGROUND.

Relator/Respondent, Janet Chandler, Ph.D., brought this FCA suit in the context of a $5 million federally-funded research grant to study treatment modalities for drug-addicted pregnant women. The grant funded a comprehensive one-stop treatment program for pregnant women ("New Start Program") at Cook County Hospital —the largest public hospital in Chicago serving indigent and uninsured residents—as well as a research study to compare the effectiveness of the New Start Program with methadone treatment available in local community clinics ("New Start Study"). (Amended Complaint at ¶¶ 1-3.) Over 300 women and their offspring participated in the New Start Study, which was conducted over a six-year period. Relator, a clinical psychologist who was the project director and later the co-principal investigator of the New Start Study, was discharged prior to the submission of the final New Start report to the granting agency. (*Id.* at ¶ 9.) Relator summed up her allegations as follows:

> 4. The false claims arise out of the defendants' knowing and deliberate failure to comply with the express terms and conditions incorporated into and promised by the grant, the reporting of "ghost" research subjects, and other material misrepresentations about the progress and success of the study. In addition, defendants disregarded the required protocol designed to protect human research subjects which defined the medical treatment of pregnant women and thereby placed the research subjects, their fetuses, and offspring at great risk.

(*Id.* at ¶ 4.) The Amended Complaint nowhere alleges that the grant funds were used for anything other than the New Start Program and Study. Relator claims that

she was discharged from her employment in the New Start Study in retaliation for disclosing her FCA allegations. (*Id.* at ¶ 5.)

Relator alleges that the United States was damaged in the total amount of the grant, $5 million, which, under Section 3729, is automatically trebled to $15 million. Relator also seeks $10,000 each for an unspecified number of alleged false claims as well as attorneys' fees, expenses and costs. The United States declined to intervene in this lawsuit.

II. PROCEEDINGS BELOW.

Relator filed her complaint under seal. After the United States declined to intervene, Relator amended her complaint and served it upon Defendants, Cook County, Cook County Hospital, and The Hektoen Institute for Medical Research, a non-profit organization that, among other things, conducts medical research and manages research grants. As their responsive pleadings, all Defendants moved to dismiss. During the briefing of the motions to dismiss, an opinion issued from the United States District Court for the Southern District of New York that held that the FCA "does not authorize suits against municipal entities." *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 356 (S.D.N.Y. 1998). Based on that decision, Cook County sought, and was granted, leave to supplement its motion to dismiss in order to assert municipal immunity from suit under the FCA.

In the meanwhile, Cook County informally provided Relator with (i) documents relating to the grant proposal, (ii) interim reports and the final report to the granting agency, and (iii) a letter from the granting agency advising that the final report fully satisfied the requirements

of the grant, praising the depth of the report, and encouraging Cook County Hospital to develop further research studies. Nonetheless, before the district court ruled on Cook County's motion to dismiss, Relator served Cook County with discovery in which she sought virtually all medical and research records associated with the New Start Program and Study. Cook County objected to the production of the voluminous confidential records on the grounds that all of the medical records of persons not parties to this litigation were privileged both under federal law, 42 U.S.C. § 290dd-2(a) and the regulations promulgated thereunder,[1] and under state law, 735 ILCS 5/8-802 (physician/patient privilege). Cook County also objected to the production of the research records of the New Start Study under the Illinois Medical Studies Act. 735 ILCS 5/8-2105 (making it a misdemeanor offense to dis-

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1 42 U.S.C. § 290dd-2 provides:

> Records of the identify, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation or research, which is conducted, regulated or directly or indirectly assisted by any department or agency of the United States shall . . . be confidential and be disclosed for only the purposes and under the circumstances expressly authorized under subsection (b) of this section.

42 U.S.C. § 290dd-2(a). The regulations promulgated under the statute are intended to "insure that an alcohol or drug abuse patient in a federally-assisted alcohol or drug abuse program is not made more vulnerable by reason of the availability of his or her patient record than an individual who has an alcohol or drug problem and who does not seek treatment." 42 C.F.R. § 2.3(b)(2). Consequently, patient records may be "disclosed or used only as permitted by these regulations and may not otherwise be disclosed or used in any civil, criminal, administrative, or legislative proceeding conducted by any Federal, State, or local authority." 42 C.F.R. § 2.13(a). In addition, 42 U.S.C. § 290dd-2(f) imposes a criminal penalty for violations of § 290dd-2(a) and the corresponding regulation.

close any information obtained in a medical study). On January 7, 1999, the district court found good cause under the FCA to require Cook County to produce all of the documents requested, albeit redacted and under a protective order. *United States of America ex rel. Janet Chandler, Ph.D. v. The Hektoen Institute For Medical Research, et al.*, 1999 U.S. Dist LEXIS 589 (N.D. Ill. January 7, 1999).

Subsequently, on February 8, 1999, the district court denied Cook County's motion to dismiss the FCA claim on the ground of municipal immunity. *United States of America ex rel. Janet Chandler, Ph.D. v. The Hektoen Institute For Medical Research, et al.*, 35 F. Supp. 2d 1078 (N.D. Ill. 1999). (App. at 3a.) Cook County filed a timely notice of appeal under 28 U.S.C. § 1291 based on the collateral order doctrine seeking review of the district court's denial of its immunity claim. The district court denied Cook County's motion to stay discovery pending the appeal of the immunity issue.

The Seventh Circuit ordered the parties to file simultaneous memoranda addressing appellate jurisdiction. Without an opinion, on May 18, 1999, the Seventh Circuit dismissed the appeal. The Seventh Circuit stated that "[t]here is no arguable immunity issue and no basis for appellate jurisdiction over Cook County's appeal. Cook County must await a final decision in order to appeal." (App. at 2a.)

REASONS FOR GRANTING THE WRIT

This petition for a writ of certiorari presents two legal issues of first impression critical to units of local government. The first is whether a local government is absolutely immune from an FCA suit where the FCA's

mandatory treble damage provision is punitive but Congress never abrogated such an immunity by expressly including local governments as suable persons under the FCA. There is currently a split in the circuits as to (a) whether the mandatory treble damage provision is punitive and (b) Congressional intent with respect to the meaning of a suable "person" under 31 U.S.C. § 3729. *See United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195, 207 (2d Cir. 1998), *cert. granted*, 67 U.S.L.W. 3784 (1999) (holding that the mandatory treble damages are not punitive and that a state is a person under the FCA); *United States ex rel. Zissler v. Regents of the University of Minnesota*, 154 F.3d 870, 873, 875 (8th Cir. 1998) (holding that states are suable persons under the FCA and commenting that the FCA's treble damages are remedial and not punitive); *United States v. Brekke*, 97 F.3d 1043, 1048 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1281 (1997) (holding that the FCA's treble damages are not punitive); *contrast United States ex rel. Long v. SCS Business and Technical Inst.*, 173 F.3d 870, 875-81 (D.C. Cir. 1999) (holding that the FCA's mandatory treble damages are punitive and that the FCA's definition of a suable defendant does not include states). However, those appellate cases deal with a *state's* immunity under the FCA. Nonetheless, district courts will necessarily rely on the holdings and reasonings espoused by the circuit courts addressing a *state's* immunity under the FCA when determining a claim of municipal immunity. For example, the district court in the instant case relied on both *Stevens* and *Zissler* in denying Cook County's immunity claim, holding that the FCA's mandatory treble damages are not punitive and that the term "person" includes local govern-

ments. *Chandler*, 35 F. Supp. 2d at 1084-86. (App. at 14a-21a.)[2]

The Court recently granted certiorari in *Stevens* to determine whether a *state* can be sued under the FCA. No. 98-1828, 67 U.S.L.W. 3784 (1999). *Stevens* involved the district court's denial of the State of Vermont's motion to dismiss on Eleventh Amendment grounds. Although the Second Circuit's reasoning regarding the nature of the treble damages and whether a *state* is a person under the FCA directly implicates local governments,[3] the issue of municipal immunity under the FCA will not be squarely before the Court in *Stevens*. Rather, *Stevens* involves an interpretation of the Eleventh Amendment vis-à-vis the FCA as well as whether a *state* is subject to liability under the FCA. Only this case presents the Court with the opportunity to resolve the vital issue of a local government's immunity from an FCA suit.[4]

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[2] When ruling on Cook County's immunity claim on February 8, 1999, the district court did not have the benefit of the contrary holding in *Long*, where the D.C. Circuit flatly rejected the reasoning in both *Stevens* and *Zissler* regarding the FCA's mandatory treble damages and Congressional intent regarding the word "person" in the FCA. *Long*, 173 F.3d at 875-78.

[3] For example, the district court in the instant case read *Stevens* as applying to *both* states and local governments. *Chandler*, 35 F. Supp. 2d at 1084. (App. at 16a.)

[4] Cook County is joining the City of New York's *amicus* brief on the merits in *Stevens*, No. 98-1828. The *Amici* have invited the Court to resolve issues raised in *Stevens* as they particularly relate to municipal immunity. In the event the Court accepts this invitation, Cook County alternatively requests that the Court hold Cook County's petition pending review of *Stevens*. Should the Court, in the *Stevens* case, resolve the issues raised herein favorably to municipal entities, Cook County further requests that the Court remand this case with instructions to vacate the denial of Cook County's claim of municipal immunity.

The second issue in this Petition is whether a local government's claim of absolute immunity from an FCA suit is immediately appealable under the collateral order doctrine. The Seventh Circuit erroneously dismissed this appeal in six lines without opinion. (App. at 2a.) The Court should grant the writ to resolve both of these legal issues of first impression.

I. RESOLUTION OF THE CONFLICT IN THE CIRCUITS IS CRITICAL TO THE ISSUE OF MUNICIPAL IMMUNITY FROM A FALSE CLAIMS ACT SUIT.

A. The Circuits Are Split As To Whether The FCA's Mandatory Treble Damage Remedy Is Punitive.

Since it was enacted in 1863, Congress has made numerous changes to the FCA. However, the most significant and substantial changes occurred with the 1986 amendments. *See Graber,* 8 F. Supp. 2d at 352 (citing S. Rep. No. 345, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 5266. "These amendments strengthened the [FCA] by, among other things, dramatically increasing the mandatory civil remedies from double damages to treble damages and the fines from $2,000 to $5,000-$10,000 for each violation," *id.*, and by providing for relator's reasonable attorney's fees plus expenses and costs. 31 U.S.C. § 3730(d). To date, the Court has not analyzed whether the mandatory treble damages together with increased fines and attorney's fees of the 1986 amendments to the FCA constitute punitive damages. The Court, in analyzing the pre-1986 version of the FCA, determined that the fine plus double damage scheme did not constitute punitive damages. *See United States v. Halper,* 490 U.S. 435, 449, 109 S. Ct. 1892, 1902 (1989); *United States v.*

Bornstein, 423 U.S. 303, 315, 96 S. Ct. 523, 530-31 (1976); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 550, 63 S. Ct. 379, 387 (1943). Some circuits understood the Court's analysis of the pre-1986 version of the FCA to suggest that the mandatory treble damage remedy of the current version of the FCA is remedial, *see Stevens*, 162 F.3d at 207; *Zissler*, 154 F.3d at 873 (citing *Brekke*, 97 F.3d at 1048); *Brekke*, 97 F.3d at 1048); and one circuit found that it can only be characterized as punitive. *Long*, 173 F.3d at 877.

In concluding that the double damage provision in the pre-1986 version of the FCA, in which a relator received one-half of the government's recovery,[5] was compensatory and not punitive, the Court noted that Congress' authorization of double damages insured that the United States would be completely compensated "for the costs, delays, and inconveniences occasioned by fraudulent claims." *Bornstein*, 423 U.S. at 315, 96 S. Ct. at 530-31. In other words, where the relator receives one-half of the recovery, the United States can only be made whole by double damages. *See id.*, 96 S. Ct. at 530 ("This make-whole purpose of the Act is best served by doubling the Government's damages before any compensatory payments are deducted."); *see also Marcus*, 317 U.S. at 551-52, 63 S. Ct. at 388 ("the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole"). The Court further noted that Congress could have provided for treble

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[5] Under the 1986 amendments to the FCA, the relator is entitled to (i) between 25% and 30% of the proceeds of the action if the United States does *not* intervene, or (ii) between 15% and 25% of the proceeds if the United States intervenes. In addition, a relator is entitled to all expenses, fees, costs, and attorneys' fees. 31 U.S.C. § 3730(d).

damages in the FCA as it did in the antitrust laws and that such treble damages might be considered "punishment" for purposes other than double jeopardy. *Marcus*, 317 U.S. at 550, 63 S. Ct. at 387.

In other circumstances, the Court has acknowledged that treble damages are punitive. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 261, 101 S. Ct. 2748, 2757 (1981) (favorably noting the Missouri Supreme Court's reasoning in *Hunt v. City of Boonville*, 65 Mo. 620 (1877), that a municipal corporation could not be held liable for treble damages under a trespass statute because such damages are punitive). "The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639, 101 S. Ct. 2061, 2066 (1981). Indeed, "[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *City of Newport*, 453 U.S. at 266-67, 101 S. Ct. at 2759. Like punitive damages, mandatory treble damages provide the United States with a windfall at the expense of local taxpayers rather than make the United States whole. *See id.* at 267, 101 S. Ct. at 2760 (noting that punitive damages "are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill").

While no municipal immunity exists with respect to *compensatory* damages for tort liability, *see Owen v. City of Independence, Mo.*, 445 U.S. 622, 657, 100 S. Ct. 1398, 1418 (1980), the Court has recognized a long-standing common-law municipal immunity from *punitive* damages. *See City of Newport*, 453 U.S. at 263 n.23,

101 S. Ct. at 2758 n.23 (recognizing "the soundness of the common-law defense at that time and now"). Assessing punitive damages against a local government is "contrary to sound public policy." *Id.* at 263, 101 S. Ct. at 2757. "[I]mposing punitive damages on municipalities may create a serious risk to the municipalities' financial integrity." *Barnier v. Szentmiklosi,* 810 F.2d 594, 599 (6th Cir. 1987) (citing *City of Newport,* 453 U.S. at 270-71, 101 S. Ct. 2761-62). "The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial, and we are sensitive to the possible strain on local treasuries and therefore on services available to the public at large." *City of Newport,* 453 U.S. at 270-71, 101 S. Ct. 2762. "The general rule today is that no punitive damages are allowed [against a municipal entity] unless expressly authorized by statute." *Id.* at 260 n.20, 101 S. Ct. at 2756 n.20. In addition, punitive damages should be imposed only against individual wrongdoers. *Id.* at 267, 101 S. Ct. at 2760. To the extent a punitive award is allowed against a governmental entity, it punishes the general public instead, who took no part in the alleged wrongdoing. *See id.,* 101 S. Ct. at 2759. Finally, the goal of deterrence is not served by imposing punitive damages against a government because such sanctions are not likely to restrain future violations by individual actors who are not likely "to pay such sizable awards." *Id.* at 268, 101 S. Ct. at 2760.

Consequently, local governments have been exempted from all liability under statutes that assess treble damages. *See id.* at 261-62, 101 S. Ct. at 2757 (recognizing a Missouri opinion in which "a municipality could not be found liable for treble damages under a trespass statute"); *see also Barnier,* 810 F.2d at 598-99 (although treble damages were permitted by a state false arrest statute, court

refused to assess treble damages against a municipality). Indeed,

> [The] relation which the officers of a municipal corporation sustain toward the citizens thereof for whom they act, is not in all respects identical with that existing between the stockholders of a private corporation and their agents; and there is not the same reason for holding municipal corporations, engaged in the performance of acts for the public benefit, liable for willful or malicious acts of its officers, as there is in the case of private corporations.

City of Newport, 453 U.S. at 261-62, 101 S. Ct. at 2757 (quoting *Hunt v. City of Boonville*, 65 Mo. 620, 625 (1877)). For that reason, "Congress is not thought to impose punitive damages on public entities lightly." *Long*, 173 F.3d at 877.

Where a complaint seeks both compensatory and punitive damages under its legal theory, a local government can claim immunity from liability from punitive damages. Where, on the other hand, a suit is brought under a statute that *mandates* treble damages and a district court has no discretion to reduce the damage award, the municipal immunity from punitive treble damages necessarily becomes an immunity from suit, not simply from liability. For example, "a civil claim brought under section 1964(c) of the RICO Act, with its mandatory award of treble damages which are punitive in character, cannot be maintained against a municipal corporation." *See Genty v. Resolution Trust Corp.*, 937 F.2d 899, 914 (3d Cir. 1991); *see also Pelfresne v. Village of Rosemont*, 22 F. Supp. 2d 756, 761 (N.D. Ill. 1998) (under the reasoning of *Genty*, a civil RICO claim cannot be brought against a municipality because of the punitive mandatory treble damage award); *Massey v. City of Oklahoma*,

643 F. Supp. 81, 85 (W.D. Ok. 1986) (RICO's mandatory treble damages are punitive, and, thus, a suit cannot be maintained against a municipality, citing *City of Newport*).

Because the question of whether the FCA's mandatory treble damage plus fine and attorneys' fees scheme constitutes punitive damages is pivotal to the question of municipal immunity from an FCA suit, the Court should grant this petition.

B. The Circuits Are Split As To The Scope Of A Suable "Person" Under 31 U.S.C. § 3729.

The Court has, "on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" *Owen*, 445 U.S. at 637, 100 S. Ct. at 1408 (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)); *accord City of Newport*, 453 U.S. at 263, 101 S. Ct. at 2758; *see also Graber*, 8 F. Supp. 2d at 351 ("If *City of Newport* means anything at all, it means that it is up to Congress to clearly signal its desire to subject municipalities to exemplary damages, regardless of plaintiff."). Because Congress would specifically have to abrogate a local government's immunity from an FCA suit, the only remaining question is whether Congress intended to include local governments as defendants under the FCA despite the imposition of treble damages. Therefore, the question of municipal immunity from an FCA suit also requires the Court's resolution of the split in the circuit's regarding the scope of a suable "person" under 31 U.S.C. § 3729.

"[T]here is a significant conceptual overlap—though admittedly not an identity—between the abrogation in-

quiry and the statutory construction question" whether Congress intended to include local governments as defendants upon which mandatory treble damages could be assessed. *See Long*, 173 F.3d at 889. The word "person" is not defined in Section 3729, *see* 31 U.S.C. § 3729, but there is no indication "that fraud by . . . municipalities, as opposed to fraud by individuals and corporations, played any role in Congress's consideration of the 1986 amendments." *Graber*, 8 F. Supp. 2d at 354. Nonetheless, the circuits are in disagreement as to whether Congress intended to include a *state* as a "person" that can be sued under the FCA. *See Stevens*, 162 F.3d at 207 (holding that a state is a person under the FCA); *Zissler*, 154 F.3d at 873, 875 (same); *contrast Long*, 173 F.3d at 881 (holding that a suable defendant does not include states).

Because *Stevens* addresses only the question of whether Congress intended to include *states* as defendant persons in the FCA, the Court should grant the writ to resolve the question of whether a local government is a "person" that can be sued under 31 U.S.C. § 3729.

C. Resolution Of The Issue Of Municipal Immunity From An FCA Suit Is Critical To Local Governments.

Given the range of federally-funded services provided by local governments and the reality that local governments are typically regarded "deep pockets" for purposes of litigation, local governments are particularly vulnerable to lawsuits by disgruntled employees intent on the FCA's bounty. In recent years, there has been an increase in FCA suits filed against local governments. These suits expose taxpayers of local governments to litigation costs, the risk of harsh penalties, and the threat of disruption of federally funded government services.

Once filed, an FCA suit against a local government takes on a life of its own, irrespective of the United States' decision not to intervene; *see, e.g., United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734 (3d Cir. 1997); *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013 (7th Cir. 1999); *United States ex rel. Devlin v. County of Merced*, 1996 U.S. App. LEXIS 17681 (9th Cir. July 11, 1996); *United States ex rel. Mistick PBT and Mistick PBT v. Housing Auth. of the City of Pittsburgh*, 1999 U.S. App. LEXIS 17935 (3d Cir. July 30, 1999); *Chandler*, 35 F. Supp. 2d 1078 (App. at 3a); irrespective of the lack of damage to the United States; *see Graber*, 8 F. Supp 2d at 356 (finding that all of the federal monies were used to fund the program); *Chandler*, 35 F. Supp. 2d 1078 (App. at 3a) (no allegation in the Amended Complaint that the federal monies at issue were used for any purpose other than funding the grant); irrespective of any settlement reached between a local government and the United States; *see Dunleavy*, 123 F.3d 734; irrespective of a conclusion by the United States that no fraud occurred; *see id.;* and irrespective of the local government's correction of any problems to the satisfaction of the United States. *See Lamers*, 168 F.3d 1013. For example, even though the City of Green Bay ultimately prevailed, it was forced to spend resources on defending the FCA suit, which even threatened the operation of a vital federal program of public transportation. *Lamers*, 168 F.3d 1013. In *Dunleavy*, despite its settlement with the Department of Housing and Urban Development ("HUD"), the local government did not prevail in an FCA suit, thereby imposing on its taxpayers three times the amount that the local government was found to have failed to remit to HUD. 123 F.3d 734.

A local government is not like a private corporation. A local government and the United States enjoy a cooperative relationship, with the federal government providing funding for services that a local government, in turn, provides directly to its residents. In fact, it is that cooperative relationship of passing funds to a local government for the administration of direct services that contributes to making a local government a "deep pocket" target for an FCA lawsuit. Moreover, FCA suits interfere with the statutory procedures for funding and administration designed to ensure both compliance with federal requirements and the provision of government services. The inevitable result is that the cooperative relationship enjoyed by the federal and a local government will be frustrated by the threat of disruption of services or the reticence of a local government's availing itself of federal funding because of a local government's vulnerability to an FCA lawsuit for draconian damages.

A recent verdict against a local school board in New Orleans demonstrates the wisdom of municipal common law immunity from statutes imposing mandatory treble damages. In *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 46 F. Supp 2d (E.D. La. 1999), a jury returned a verdict in favor of the relator and the United States, and the court entered a judgment of approximately $31 million. Although the court found that it was empowered to reduce the statutory fine, it was bound by the FCA's mandatory treble damages:

> The judgment, against a public school district responsible for educating children, many of them poor, is over four times the losses actually incurred by the federal government. The court finds that this judgment, especially in light of importance of protecting the real victims of the School Board's actions—the public school children of New Orleans—is excessive.

> A penalty of $100,000 is an adequate forfeiture, as the automatic trebling of the verdict as prescribed in the statute has already resulted in a judgment for $15.8 million more than was actually falsely claimed by the [Orleans Parish School Board]. The court therefore reduces the amount of the statutory penalty from $7,850,000 to $100,000.

Id. at 565. This extraordinary judgment will be borne by the innocent taxpayers and the children who attend the New Orleans schools.[6]

The harm facing a local government through the filing of an FCA suit, however, is perhaps most obvious under the allegations of the instant case. Even though the United States has declined to intervene in this case, the sheer filing of this FCA suit has opened the floodgates to the disclosure of medical records of non-party substance abusing pregnant women—records that are so confidential that they are protected by federal law and the regulations promulgated thereunder. *See* 42 U.S.C. § 290dd-2(a); *compare Carr v. Alleghany Health, Educ. & Research Found.*, 933 F. Supp. 485 (W.D. Pa. 1996) (plaintiff in race discrimination case who alleged having received less favorable treatment for an alcohol problem than other employees was denied access to any substance abuse or treatment information regarding co-workers); *see also Local 738, Int'l Bhd. of Teamsters v. Certified Grocers Midwest, Inc.*, 737 F. Supp. 1030 (N.D. Ill. 1990) (defendant employer was not entitled to the substance abuse medical records of a former employee in defending against the plaintiff union's grievance claim that the employee was improperly terminated for use of

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[6] The *Garibaldi* court rejected the argument that the New Orleans Parish School Board is not a suable person under the FCA. *Garibaldi*, 46 F. Supp. 2d at 558-59.

drugs on the job). The New Start participants were advised when they entered the New Start Program and Study that all records regarding their drug and alcohol treatment would be strictly confidential under federal law.[7] Yet, as a consequence of the district court's discovery ruling in this FCA suit, these same non-party former (and possibly current) substance abusers have received letters from the prosecutor's office (which is also defending this civil matter) informing them of this FCA lawsuit and Relator's request for their medical records.[8] Finally, the ongoing discovery in the instant case is sensitive, time-consuming, and costly. This case offers a prime example of an FCA case that has taken on a life of its own against a unit of local government under the lucrative provisions of the FCA.

Given the profound implications that the FCA's mandatory treble damages has on local governments and given the split in the circuits regarding whether those

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[7] The congressional committee that put the original drug confidentiality statute, 42 U.S.C. § 290dd-2, into final form noted in its report:

> The conferees wish to stress their conviction that the strictest adherence to . . . [confidentiality] is absolutely essential to the success of all drug abuse prevention programs. Every patient and former patient must be assured that his right to privacy will be protected. Without that assurance, fear of public disclosure of drug abuse or of records that will attach for life will discourage thousands from seeking the treatment they must have if this tragic national problem is to be overcome.

H.R. Rep. No. 92-920, 92nd Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 2045, 2072.

[8] To limit the distress some of the New Start participants might experience by being notified by the state prosecutor's office of the instant lawsuit and of Relator's desire for access to their medical records, Cook County filed a motion requesting the appointment of a special master, but that motion was denied. Cook County also sought, unsuccessfully, an order from the district court allowing an interlocutory appeal of the confidentiality issues.

mandatory treble damages are punitive and whether the Congressional intent was to include government entities as suable defendants under the FCA, the Court should take this opportunity to resolve this important municipal immunity issue by granting this petition.

II. A LOCAL GOVERNMENT'S IMMUNITY FROM SUIT UNDER THE FCA SHOULD BE DECIDED IN THE FIRST INSTANCE BECAUSE SUBJECTING A LOCAL GOVERNMENT TO PROTRACTED DISCOVERY AND TRIAL BEFORE DECIDING THE IMMUNITY ISSUE IS COSTLY AND DISRUPTIVE AND, IN THIS CASE, IMPLICATES NONPARTIES AND THEIR CONFIDENTIAL SUBSTANCE ABUSE TREATMENT RECORDS.

Cook County appealed the district court's denial of its motion to dismiss based on municipal immunity from suit under the collateral order doctrine. Without explanation, the Seventh Circuit dismissed Cook County's appeal for lack of jurisdiction, simply stating that "[t]here is no arguable immunity issue. . . . Cook County must await a final decision in order to appeal." (App. at 2a.) As it has done before, the Court should review this immunity issue despite the Seventh Circuit's failure to do so. *See Nixon v. Fitzgerald*, 457 U.S. 731, 743, 102 S. Ct. 2690, 2697-98 (1982) (despite the D.C. Circuit's dismissal of the appeal without an opinion, the Court granted certiorari because the appeal raised a serious and unsettled question); *Harlow v. Fitzgerald*, 457 U.S. 800, 806, 102 S. Ct. 2727, 2732 (1982) (granting certiorari where the D.C. Circuit dismissed the appeal without opinion to settle a new immunity question).

The collateral order doctrine is well-settled—"a decision of a district court is appealable if it falls within 'that small class which finally determine claims of right separable from, and collateral to, rights asserted in the

action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.' " *Mitchell v. Forsyth*, 472 U.S. 511, 524-25, 105 S. Ct. 2806, 2814 (1985) (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 1225 (1949)). "As an additional requirement, *Cohen* established that a collateral appeal of an interlocutory order must 'presen[t] a serious and unsettled question.' " *Nixon v. Fitzgerald*, 457 U.S. at 742, 102 S. Ct. at 2697. To the extent that the denial of an immunity claim turns on an issue of law, it is a final and appealable issue under 28 U.S.C. § 1291, even though there is no final judgment in the case. *Id.* at 530, 105 S. Ct. at 2817. Cook County's appeal of the issue of municipal immunity from an FCA suit meets all of the collateral order doctrine requirements.

Unlike the immunity from liability for punitive damages in a case where a local government can nevertheless be held liable for compensatory damages, such as under 42 U.S.C. § 1983, the question of municipal immunity vis-à-vis the FCA goes to the heart of whether a local government can even be sued under that statute. The treble damage award in the FCA is mandatory. It is all or nothing. Either a local government can be fully liable for the FCA's mandatory treble damages, or it cannot be sued at all under the FCA. In the most comprehensive analysis of the issue to date, one district court has held that the FCA "does not *authorize* suits against municipal entities." *Graber*, 8 F. Supp. 2d at 356 (emphasis added). The Court has never determined the extent of municipal immunity from suit under a mandatory treble damage scheme. *Compare Harlow*, 457 U.S. at 806, 102 S. Ct. at 2732 (although the D.C. Circuit had dismissed the appeal brought under the collateral order doctrine without

opinion, the Court took the appeal because it had never determined the immunity available to presidential senior aides and advisors).

However, most importantly, as a practical matter, the question of a local government's immunity from an FCA suit is effectively unreviewable after a final judgment has been entered. The heart of this appeal is not whether the FCA insulates Cook County from liability, but rather whether Cook County is immune from an FCA suit. Indeed, "the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell,* 472 U.S. at 527-28, 105 S. Ct. at 2815. Consequently, issues of municipal immunity should be resolved even before the commencement of discovery. *See Harlow,* 457 U.S. at 818, 102 S. Ct. at 2738.

This case presents one of the most compelling rationales of why the municipal immunity from suit question should be decided in the first instance. Because the allegations directly impact on a study conducted on pregnant substance abusers, the most sensitive of records, albeit redacted, are being produced. As this case goes on, non-party women who sought and were provided medical and related substance treatment in a federally funded program and study may be subjected to depositions and even to live testimony at trial. Given the allegations and discovery involving the confidential medical treatment of non-parties to this litigation, the damage will already be done if, as the Seventh Circuit ordered, Cook County has to wait until the end of the trial in this case for the immunity question to be decided. (App. at 2a.) If immunity from an FCA action is to have any application at all to a local government, it must be resolved as a threshold matter.

Because the question of whether a local government is immune from suit under the FCA falls squarely within the collateral order doctrine and because, like other immunities recognized by the Court, a local government's immunity from an FCA suit is an important question which, as a practical matter, is unreviewable after the case has been fully adjudicated, the Court should grant the writ.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

May 18, 1999

Before HON. JOHN L. COFFEY, *Circuit Judge*
HON. FRANK H. EASTERBROOK, *Circuit Judge*
HON. ILANA DIAMOND ROVNER, *Circuit Judge*

No. 99-1415

JANET CHANDLER, Doctor,
Plaintiff-Appellee,

v.

COOK COUNTY, ILLINOIS,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois
Eastern Division

No. 97 C 514—Robert W. Gettleman, Judge

ORDER

On consideration of the jurisdictional papers submitted by the parties,

IT IS ORDERED that this appeal is DISMISSED for lack of jurisdiction. Cook County seeks to appeal an interlocutory order denying its motion to dismiss. There is no arguable immunity issue and no basis for appellate jurisdiction over Cook County's appeal. Cook County must await a final decision in order to appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. ILLINOIS
EASTERN DIVISION

No. 97 C 514

UNITED STATES OF AMERICA EX REL.
JANET CHANDLER, Ph.D.,
Plaintiff,

v.

THE HEKTOEN INSTITUTE FOR MEDICAL RESEARCH;
COOK COUNTY HOSPITAL; and COOK COUNTY, ILLINOIS,
Defendants.

Feb. 9, 1999

MEMORANDUM OPINION AND ORDER

GETTLEMAN, District Judge.

Relator/plaintiff Janet Chandler ("plaintiff") has brought a three-count complaint against defendants the Hektoen Institute for Medical Research ("Hektoen"), Cook County Hospital ("CCH"), and Cook County (together, "the County Defendants"). Plaintiff alleges: (1) presentation of false claims in violation of the False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq. (Count I); (2) retaliation in violation of the FCA (Count II); and (3) retaliatory discharge in violation of Illinois law and public policy (Count III).

Defendant Hektoen moves to dismiss Counts I and III, arguing that: (1) the FCA's qui tam provisions are unconstitutional; and (2) plaintiff does not allege that Hektoen's actions violated clearly established Illinois public policy. Hektoen has also moved for an extension of time in which to answer Count II, pending the court's decision on the County Defendants' motion to dismiss Count II. The United States has filed an amicus brief in opposition to Hektoen's argument that the qui tam provisions of the FCA are unconstitutional.

The County Defendants have likewise filed a motion to dismiss the complaint, arguing that: (1) CCH is not a suable entity under Illinois law; (2) Count II fails to state a claim against the County Defendants because plaintiff was employed by Hektoen, not by the County; (3) the County Defendants are immune from punitive damages for Count III; (4) Count III fails to state a claim for retaliatory discharge; and (5) the qui tam provisions of the FCA are unconstitutional. The County Defendants have filed a supplemental motion to dismiss, arguing that they are not "persons" who can be sued under the FCA.[1]

FACTS

This action arises out of defendants'[2] alleged misconduct in implementing a federal research grant. In

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[1] On January 7, 1999, the court issued an opinion compelling defendants to produce certain documents and denying defendants' request that the court stay its discovery decision pending its decision on defendants' motions to dismiss. On January 13, 1999, the County Defendants filed a Motion for Reconsideration of a portion of the court's January 7 opinion, requesting that the court stay discovery pending its decision on the immunity claim defendants raised in their supplemental motion to dismiss.

[2] The court does not differentiate between Hektoen and the County Defendants when discussing parts of plaintiff's complaint where she uses the term "defendants" to refer jointly to all defendants.

1989, the National Institute of Drug Abuse ("NIDA") issued a request for proposals for a study investigating the treatment of drug-dependent pregnant women. In response, CCH submitted a grant application seeking $5 million to study 300 such women over the course of five years (the "New Start study"). CCH also submitted an Assurance of Compliance plan to a division of the United States Department of Health and Human Services ("HHS"). In this plan, CCH represented that its study would comply with federal regulations governing research on human subjects. NIDA initially awarded the grant to CCH (which developed the protocol to be used in performing the study), and later transferred the administration of the grant to Hektoen. Plaintiff was hired by Hektoen as New Start's project director on September 1, 1993.

The federal grant had two components. The clinical component was designed to provide the research subjects with a comprehensive medical and social service program that included drug treatment and prenatal care. The research component was designed to study whether the research subjects had benefitted from the comprehensive treatment program.

Plaintiff alleges that during her employ, she became aware that defendants were not complying with the terms of the grant or with federal regulations and were misrepresenting the progress of the New Start study. Specifically, plaintiff alleges that defendants: did not follow the mandatory protocol associated with research on human subjects and the dispensing of methadone to pregnant women; did not obtain informed consent from study participants; did not obtain thorough medical or drug histories from the participants; provided the participants with substandard care; failed to keep accurate records; and failed to randomize participants. Plaintiff also alleges

that defendants reported "ghost" research subjects and submitted false progress reports to the government. Finally, plaintiff alleges that defendants violated the grant and federal law because they did not have procedures in place to protect whistleblowers from retaliation.

Plaintiff alleges that in 1994, she began informing doctors employed by CCH of her concerns that the study was violating the terms of the grant, the Assurance of Compliance plan, and federal regulations. She alleges that after reporting her concerns, Dr. Mason, an employee of CCH, rescinded a number of her responsibilities. Plaintiff also alleges that Hektoen retaliated against her by recalculating her vacation and sick time. According to plaintiff, after she reported in a draft of her paper for NIDA that the study had not been successful, she was further chastized by employees of both CCH and Hektoen. On January 24, 1995, John Prochaska ("Prochaska"), the administrator of Hektoen, accused plaintiff of lying in her monograph on the study and fired her. On February 21, 1995, plaintiff was formally removed as co-principal investigator of the study. Plaintiff subsequently testified at an HHS Commission on Research Integrity hearing, and in August 1996, a subdivision of HHS issued a report on the research conducted by CCH and Hektoen that identified "multiple failures to comply with requirements of the HHS human subjects regulations."

DISCUSSION

I. Defendant Hektoen's Motions

A. Motion to Dismiss Count I

Hektoen moves to dismiss Count I on the grounds that the qui tam provisions of the FCA are unconstitutional.[3]

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[3] The County Defendants incorporate this argument by reference in their motion to dismiss.

Hektoen argues: (1) qui tam relators do not have Article III standing to bring an FCA claim; (2) the qui tam provisions violate separation of powers principles by encroaching on the authority of the executive branch, U.S. Const., Art. II, § 3; and (3) the qui tam provisions violate the Constitution's Appointments Clause, U.S. Const., Art. II, § 2. Defendants rely primarily on the reasoning of a lone decision from the Eastern District of Texas, *United States ex rel. Riley v. St. Luke's Episcopal Hospital,* 982 F.Supp. 1261 (S.D.Tex.1997). The overwhelming majority of courts that have considered the issue have upheld the qui tam provisions of the FCA in the face of identical constitutional challenges.

1. Standing

Defendants argue that plaintiff does not have Article III standing to bring suit under the qui tam provisions of the FCA because she does not allege an injury-in-fact, one of the three elements of Article III standing, *see Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The Seventh Circuit has held that because the United States is the real party in interest in a qui tam action, a relator has standing to pursue the suit as long as the federal government has suffered an injury-in-fact. *See United States ex. rel. Hall v. Tribal Development Corp.,* 49 F.3d 1208, 1214 (7th Cir.1995) ("It is enough . . . that the United States, as the entity on whose behalf and in whose name this suit was brought, has suffered an injury in fact under Article II. Requiring an additional showing of injury on the part of the qui tam relator would be an analytical redundancy.").

Although defendants acknowledge the existence of *Hall,* they urge this court to abjure binding precedent in favor of the reasoning of *Riley,* a district court decision from

another circuit that explicitly disagreed with *Hall*. *See Riley*, 982 F.Supp. at 1266. Defendants also argue that *Hall* is not binding on this court because it did not arise under the FCA. However, *Hall* relied on FCA cases to draw its ultimate conclusion that qui tam relators need not demonstrate an injury-in-fact. *See U.S. v. Johnson*, 43 F.3d at 1214 (quoting the Second Circuit's holding in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154 (2d Cir.1993): "[i]n a qui tam action [under the False Claims Act], the plaintiff sues on behalf of and in the name of the government and invokes the standing of the government resulting from the fraud injury."). The FCA comports with the principle that "if an injured person assigns his right of action to someone else, the assignee has standing to enforce the right even though he is not the one who was injured by the defendant's wrongdoing." *National Ass'n of Realtors v. National Real Estate Ass'n, Inc.*, 894 F.2d 937, 941 (7th Cir.1990).

Other courts have used similar reasoning to hold that qui tam relators have standing to bring suit under the FCA. *See, e.g., United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir.1993) ("the FCA effectively assigns the government's claims to qui tam plaintiffs such as Kelley, who then may sue based upon an injury to the federal treasury."); *United States ex rel. Lamers v. City of Green Bay*, 924 F.Supp. 96, 98 (W.D.Wis.1996) (agreeing with *Kelly*); *United States ex rel. Robinson v. Northrop Corp.*, 824 F.Supp. 830, 836 (N.D.Ill.1993) ("Congress . . . can transfer the rights of the United States to private citizens, and because it did just that through the FCA, plaintiffs have standing to sue."). The court finds that plaintiff has standing to bring this suit.

2. Separation of Powers

Hektoen also argues that the FCA's qui tam provisions violate the principle of separation of powers because they grant Congress exclusive control over executive functions. Article II vests the executive branch with the power to execute the laws. Because the FCA includes a number of provisions that enable the executive branch to maintain control over qui tam suits, the statute does not arrogate the executive function to Congress. Section 3730(b)(2) explicitly gives the Attorney General the authority to intervene and protect the interests of the executive branch, and § 3730(c)(2) gives the government the authority to dismiss or settle the action even if the relator objects. Although Hektoen argues that the government no longer retains control over the present litigation because it has declined to intervene, the FCA grants the government the right to intervene at any time upon a showing of good cause. *See* 31 U.S.C. § 3730(c)(3).

This court follows the vast majority of courts that have considered this issue and finds that the FCA does not run afoul of the separation of powers doctrine. *See United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir.1994); *Kelly*, 9 F.3d at 755 ("[T]he FCA gives the Attorney General sufficient means of controlling or supervising relators to satisfy separation of powers concerns."); *Kreindler*, 985 F.2d at 1155 ("[T]he FCA qui tam provisions do not usurp the executive branch's litigating function because the statute gives the executive branch substantial control over the litigation."); *see also Robinson*, 824 F.Supp. at 837. *But see Riley*, 982 F.Supp. at 1269 n. 5 (noting in a footnote that "the qui tam provisions of the False Claims Act also raise serious constitutional concerns as to whether Congress may delegate the executive powers of law enforcement to private parties . . .").

3. Appointments Clause

Finally, Hektoen argues that the FCA's qui tam provisions violate the Appointments Clause, which vests the executive branch with the exclusive power to appoint officers to execute the laws of the United States. Numerous other courts have held that qui tam relators are not officers within the meaning of the Appointments Clause. *See, e.g., Taxpayers Against Fraud,* 41 F.3d at 1041 (holding that relators are not "officers" because the government may take control of such cases whenever it wishes, and because the relator's position is without tenure or continuous duties); *Kelly,* 9 F.3d 743, 757 (holding that unappointed qui tam relators do not wield so much governmental power that their appointments must conform to the requirements of the Appointments Clause); *Robinson,* 824 F.Supp. 830, 836 (holding that relators are not officers because they seek to vindicate not only public rights, but their own private rights as well).

Hektoen argues that qui tam relators are officers by analogizing them to special prosecutors. The court notes that the Seventh Circuit has likewise analogized relators to prosecutors, *see Hall,* 49 F.3d at 1213, and has never expressed any concern that these private parties are "officers" appointed by Congress in violation of the Appointments Clause. The court finds that relators are unlike prosecutors because they are suing to protect private rights, not just the public interest, and because they stand to reap private financial gain. Moreover, because the government retains the right to intervene in a relator's suit at any time, relators do not wield enough governmental power to be officers under the Appointments Clause. The court finds that the FCA's qui tam relator provisions are constitutional, and therefore denies Hektoen's and the County Defendant's motions to dismiss Count I.

B. Motion to Dismiss Count III

Hektoen moves to dismiss Count III of plaintiff's complaint, arguing that plaintff cannot state a claim for retaliatory discharge under Illinois law. Hektoen asserts that plaintiff does not allege a violation of a clearly mandated public policy, and that even if she could allege such a violation, the FCA provides her with an adequate remedy.

An employee can state a claim for retaliatory discharge only if she can demonstrate that she was terminated in retaliation for her actions, and that the discharge contravenes a clear mandate of public policy. *See Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 52 Ill.Dec. 13, 421 N.E.2d 876 (1981); *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 23 Ill.Dec. 559, 384 N.E.2d 353 (1978). "[P]ublic policy . . . is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions." *Palmateer*, 85 Ill.2d at 130, 52 Ill. Dec. 13, 421 N.E.2d 876. A plaintiff can survive a motion to dismiss only if she can show that the cited provision embodies a public policy and that the plaintiff's termination violates this public policy. *See Callozo v. Office Depot, Inc.*, 1998 WL 111628, at *2 (N.D.Ill. Mar. 6, 1998) (citing *Barr v. Kelso-Burnett Co.*, 106 Ill.2d 520, 527, 88 Ill.Dec. 628, 478 N.E.2d 1354 (1985)).

Although plaintiff alleges retaliatory discharge, she does not identify the source of the public policy that defendants allegedly violated in terminating her. Plaintiff has not cited any statutory, constitutional, or other provision in her complaint. Rather, she merely alleges that she was terminated because she took steps to promote the health and safety of the research subjects, their fetuses, their offspring, and the public at large. Efforts to promote health

and safety, standing alone, are not enough to make out a claim for retaliatory discharge. In *United States ex rel. Dihu v. IIT Research Institute*, 1998 WL 299390 (N.D. Ill. May 21, 1998), for example, a plaintiff brought an FCA claim and alleged retaliatory termination under both the FCA and state law. Although the plaintiff was concerned that certain practices at IIT were jeopardizing the health and safety of the workers, the only provision he cited was an internal Army regulation. *See id.* at *8. The court held that the plaintiff did not state a claim for retaliatory discharge because the regulations he cited did not have enough of a widespread impact on the state's citizens to embody public policy. *See id.* Plaintiff must invoke a rule that defendants violated in terminating her in order for the court to evaluate whether the violation of that rule violates state public policy.

Plaintiff may be attempting to argue that her termination contravened a public policy embodied in the FCA. However, the Illinois Supreme Court generally finds that only those statutes that impact the health and safety of citizens in general truly express public policy. *See Hamros v. Bethany Homes and Methodist Hosp. of Chicago*, 894 F.Supp. 1176, 1179 (N.D.Ill.1995) (citing cases). Plaintiff does not argue that the FCA affects the health and welfare of citizens in general. The intent of the FCA is to protect the federal government, not individual citizens. Moreover, plaintiff does not advance any state law or public policy that prohibits fraud against the federal government. *See, e.g., Adler v. Continental Ins. Co.*, 1996 WL 677085, at *10 (D.Kan. Nov. 1, 1996) (finding that alleged retaliation in violation of the FCA did not contravene Kansas public policy because "there is no clearly established Kansas public policy aimed at preventing fraud against the federal government.").

Even if plaintiff could properly allege that her discharge violated some clearly mandated state public policy, the court finds that Illinois courts would not expand the tort of retaliatory discharge to this case because the remedies embodied in the FCA serve as an adequate deterrent to future employer misconduct. As this court explained in *Hamros:* "Historically, courts have recognized the [retaliatory discharge] claim where the otherwise available remedies would not serve as an effective deterrent. . . ." 894 F.Supp. at 1179 (citing cases). Plaintiff argues that the Seventh Circuit has allowed plaintiffs to proceed with state retaliatory discharge claims that are supported by the same facts as federal claims, citing *Wright v. Illinois Dep't of Children & Family Services*, 40 F.3d 1492, 1508 (7th Cir.1994) (arising under § 1983); and *Gooden v. Neal*, 17 F.3d 925, 929 (7th Cir.1994). *Gooden* held that the plaintiff's retaliatory discharge claim was distinct from his First Amendment claim. *See* 17 F.3d at 929 ("To prevail under state law Gooden did not have to establish that his reports were protected speech, and the tort of retaliatory discharge in Illinois has not developed in precisely the same way as constitutional torts. . . .").

Unlike the First Amendment, the FCA contains a specific provision that punishes employers who discharge employees in retaliation for exercising their rights under the statute. See § 3730(h). In this respect the FCA is analogous to the FMLA, which this court and other courts have held provides a remedy that adequately deters retaliatory discharge. *See Callozzo*, 1998 WL 111628, at *5; *Hamros*, 894 F.Supp. at 1179. Like the FMLA, the FCA provides for a number of statutory remedies, including liquidated damages (in the form of a double back pay award) designed to deter the employer from future unlawful conduct. *See Hamros*, 894 F.Supp. at 1179;

see also Dihu, 1998 WL 299390, at *8 ("In this case, Dihu's Illinois claim essentially mirrors his retaliatory discharge claim under § 3730(h) of the FCA, and thus recognition of the Illinois common law claim is not necessary for Dihu to obtain the relief he seeks"). The court concludes that plaintiff has failed to demonstrate that her discharge controverts established Illinois public policy, and that even if she had shown a violation of public policy, the FCA provides her with an adequate remedy. The court grants Hektoen's motion to dismiss Count III of plaintiff's complaint.

II. County Defendants' Motions

A. Supplemental Motion to Dismiss FCA Claims (Counts I and II)

The County Defendants argue that they cannot be sued under the FCA because: (1) the County is not a "person" under the FCA; and (2) the FCA's treble damages provision is punitive, and municipalities are exempt from punitive damages. Defendants rely primarily on a New York district court decision, *United States ex rel. Graber v. City of New York*, 8 F.Supp.2d 343 (S.D.N.Y.1998). Although this is a case of first impression in this circuit, the weight of authority in other circuits holds that states are persons within the meaning of the FCA and that the FCA's treble damages provision is not punitive.

1. The County is a "Person" Under the FCA

The court considers two factors in determining whether the County is a "person" under the FCA: (1) the text of the statute; and (2) its legislative history. The statute renders liable "any person who" submits false claims to the federal government. 31 U.S.C. § 3729(a). The FCA does not define the term "person" as used in § 3729(a).

However, the civil investigative demand provision of the act includes in its definition of person "any State or political subdivision of a State." 31 U.S.C. § 3733(1)(4). In addition, courts have interpreted the statute to include states among the "person[s]" who may file qui tam actions under § 3730(b). *See, e.g., United States ex rel. Stevens v. State of Vermont Agency of Natural Resources,* 162 F.3d 195, 205 (2d Cir.1998) (holding that in light of the legislative history of § 3730(b), "Congress viewed the States as persons who could be qui tam plaintiffs"); *United States ex rel. Woodard and State of Colorado v. Country View Care Center, Inc.,* 797 F.2d 888, 893 (10th Cir. 1986); *United States ex rel. Hartigan and State of Illinois v. Palumbo Brothers, Inc.,* 797 F.Supp. 624, 631 (N.D.Ill.1992) ("We conclude that the FCA was specifically amended to provide jurisdiction for qui tam plaintiffs like Illinois.").

The court concludes that Congress intended the word "person" to have the same meaning in each section in which it is used. *See Commissioner v. Lundy,* 516 U.S. 235, 250, 116 S.Ct. 647, 133 L.Ed.2d 611 (1996) (applying the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning") (internal citations omitted). The text of the statute and other federal courts' interpretation thereof suggest that states and their political subdivisions are "person[s]" under § 3729(a). *Accord Stevens,* 162 F.3d at 205; *United States ex rel. Zissler v. Regents of the University of Minnesota,* 154 F.3d 870, 875 (8th Cir.1998).[4]

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[4] Only *Graber* has held that states were not "person[s]" who could be sued under the act, and even *Graber* conceded that "[e]ither proffered construction arguably would be consistent with the text of the statute." 8 F.Supp.2d at 355. Moreover, *Graber* relies on the district court's decision in *Zissler,* which was reversed by the Eighth Circuit on appeal as cited above.

The legislative history of the FCA likewise suggests that Congress intended to include states and other units of local government as "persons" who can be sued under the act. The Senate Report accompanying the 1986 amendments to the FCA, in a section describing the history of the act, states: "The False Claims Act reaches all parties who may submit false claims. The term 'person' is used in its broad sense to include partnerships, associations, and corporations . . . as well as States and political subdivisions thereof." S.Rep. No. 99-345, at 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273-74. Other courts have held that this language indicates that Congress interpreted the FCA as applying to states and other local governments. *Stevens*, 162 F.3d at 207; *Zissler*, 154 F.3d at 874-75; *United States ex rel. Long v. SCS Business & Technical Institute*, 999 F.Supp. 78, 85 (D.D.C.1998). The County Defendants rely heavily on *Graber*, the one case that has held otherwise. The district court's decision in that case, however, was issued after *Stevens* had been argued but before the Second Circuit issued its opinion, which effectively overruled *Graber* by holding that the FCA applied to states and local governments.[5]

2. The Damages Imposed by the FCA Are Not Punitive

The County Defendants argue that even if the County is a "person" under § 3729, the County is immune from

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[5] The district court in *Graber*, after a thorough analysis of the caselaw referenced in the Senate Report, concluded that the report was incorrect because it misinterpreted that caselaw. *Id.* at 352. Regardless of whether Congress misunderstood the way courts had interpreted the term "person" before the 1986 amendments, however, "this understanding was that the False Claims Act applied to the States, and would, after the 1986 amendments, continue to apply to the states." *Zissler*, 154 F.3d at 874-75.

suit under the FCA because the act imposes punitive damages. The Supreme Court has held that municipalities are immune from punitive damages in § 1983 suits. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). The Court found that imposing punitive liability on municipalities does not fulfill the traditional purposes of punitive damages, deterrence and retribution. *Id.* 453 U.S. at 267-71, 101 S.Ct. 2748.[6] Defendants concede that the Supreme Court has held that the FCA is not a punitive statute. *See, e.g., United States v. Halper*, 490 U.S. 435, 449, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) (holding that the FCA's "fixed-penalty-plus-double-damages provisions" does not, in most cases, constitute punishment for the purposes of double jeopardy), *overruled on other grounds by Hudson v. United States*, 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) (rejecting *Halper*'s definition of "punishment" in the double jeopardy context because double jeopardy merely prohibits the imposition of additional criminal sanctions, not of all additional sanctions that might be termed punishments); *United States v. Bornstein*, 423 U.S. 303, 314-15, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52, 63 S.Ct. 379, 87 L.Ed. 443 (1943) ("[T]he chief purpose of the statute[] here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole."). Defendants argue, however, that the foregoing cases are

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[6] The parties do not dispute that City of Newport applies to counties as well as municipalities. *See Erwin v. County of Manitowoc*, 872 F.2d 1292, 1299 (7th Cir. 1989) ("On a custom and policy claim a governmental body such as the County cannot be held liable under 42 U.S.C. § 1983 for punitive damages.").

no longer apt, because they were decided before the 1986 amendments to the FCA. According to the County Defendants, Congress transformed the FCA into a punitive statute by revising its damages provisions to allow for treble damages rather than a fixed penalty plus double damages.

Although the Seventh Circuit has yet to address the issue, a number of other circuit and district courts have held that the FCA's treble damages provision is not punitive. *See, e.g., Stevens,* 162 F.3d at 207; *United States v. Brekke,* 97 F.3d 1043, 1048 (8th Cir.1996); *United States v. Barnette,* 10 F.3d 1553, 1559-60 (11th Cir. 1994); *Long,* 999 F.Supp. at 85-86. *But see Graber,* 8 F.Supp.2d at 349. The Supreme Court has held that the federal government "is entitled to rough remedial justice." *Halper,* 490 U.S. at 446, 109 S.Ct. 1892. *Halper* reasoned that the multiple recovery allowed under the FCA was compensatory, not punitive, because it was rationally related to the government's loss. *Id.* 490 U.S. at 449, 109 S.Ct. 1892.

Under *Halper,* "proportionality is the key." *Barnette,* 10 F.3d at 1560. The compensation the government requested in *Halper* was vastly disproportionate to its losses: Although the government had suffered only $16,000 in actual damages, it requested an additional fine of $130,000, a ratio of 8 to 1. *See Barnette,* 10 F.3d at 1560 (discussing *Halper,* 490 U.S. at 452, 109 S.Ct. 1892). In the present case, plaintiff claims $5 million in actual damages to the government and seeks $15 million in compensation, plus between $5,000 and $10,000 per false claim, far less than the ratio in *Halper.* Raising the stakes from double to treble damages does not render the relationship between loss and recovery irrational in the present case. *See Brekke,* 97 F.3d at 1048 (holding

that a post-amendment FCA case was compensatory and not punitive) ("We do not see how the treble damages provision of the False Claims Act is different from the 'ordinary case' discussed in *Halper*," the case in which the damages were a fixed penalty plus double damages); *Barnette*, 10 F.3d at 1560 (holding that a 3.2 to 1 ratio of compensation to actual damages is not punitive).

In an attempt to argue that the FCA's treble damages provisions are penal, the County Defendants analogize the statute to the civil Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq. Both RICO and the antitrust laws authorize treble damages. The Seventh Circuit has held that "a treble damage antitrust suit is most appropriately characterized as an action for a penalty," and has likewise held that "[b]ecause a civil RICO claim is best characterized as an action for treble damages, . . . such an action is penal in nature." *Tellis v. United States Fidelity & Guaranty Co.*, 805 F.2d 741, 746 (7th Cir. 1986), *vacated Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987). However, the Seventh Circuit has addressed the nature of treble damages in antitrust and RICO actions for the narrow purpose of electing the state statute of limitations to apply to such actions. *See, e.g., id.* (holding that because civil RICO is penal in nature, Illinois' two-year statute of limitations for actions based on a statutory penalty applies to civil RICO claims); *Schiffman Bros. v. Texas Co.*, 196 F.2d 695, 696 (7th Cir.1952) ("[T]he real question facing us, therefore, was not whether the action was one to recover a statutory penalty within the meaning of any federal statute but whether actions such as this are limited to a period of two years under the Illinois statutes. . . . We are not concerned at all, then, with anything other than the question of what statute of

limitations of Illinois is applicable to actions to recover treble damages.").

The Seventh Circuit has never held that treble damages are, by definition, punitive. *See, e.g., Adler v. Northern Hotel Co.*, 175 F.2d 619 (7th Cir.1949) (holding that treble damages under the Housing and Rent Act are remedial in nature). The reach of *Tellis'* holding is further undermined by language in *Agency Holding Corp.*, which held that the Clayton Act's four-year statute of limitations applies to RICO claims as well, overruling *Tellis* and other cases that had applied state law statutes of limitations to RICO claims. *See Agency Holding Corp.*, 483 U.S. 143, 107 S.Ct. 2759, 97 L.Ed.2d 121. *Agency Holding Corp.* described RICO and the Clayton Act as "designed to *remedy* economic injury by providing for the recovery of treble damages, costs, and attorney's fees," and explained that "both statutes aim to *compensate* the same type of injury." *Id.* 483 U.S. at 151, 107 S.Ct. 2759 (emphasis added). The Court's use of compensatory, rather than punitive, language to discuss the purpose of civil RICO and the antitrust laws suggests that the two statutes' treble damages provisions are not wholly punitive in nature.

Finally, according to the legislative history, the purpose of the 1986 amendments was "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government" and "to make the statute a more useful tool against fraud in modern times." S.Rep. No. 99-345, at 1, *reprinted in* 1986 U.S.C.C.A.N. 5266; *see also Zissler*, 154 F.3d at 874. These broad goals suggest that Congress did not intend to place beyond the reach of the statute a large class of potential wrongdoers —municipalities, counties, and other units of local government. Taking the allegations of the complaint as true for the purposes of the present motion to dismiss, the County defendants fall within this class of wrongdoers.

The court finds that: (1) the County is a "person" for the purposes of the FCA; and (2) the FCA's treble damages provision is more compensatory than punitive. *See Stevens*, 162 F.3d at 207; *Zissler*, 154 F.3d at 875; *Taxpayers Against Fraud*, 999 F.Supp. at 78; *see also Brekke*, 97 F.3d at 1048 ("A multiple recovery of this type is compensatory rather than punitive, even though it contains a penalty element. . . ."). The FCA applies to the County.

B. Motion to Dismiss CCH

The County Defendants move to dismiss CCH from the complaint because the hospital does not have a legal existence separate from that of Cook County. *See Payne v. Cook County Hosp.*, 719 F.Supp. 730, 734 (N.D.Ill. 1989). Because Cook County is the appropriate defendant in this action, the court grants the motion to dismiss the hospital as a separate defendant.

C. Motion to Dismiss FCA Retaliatory Discharge Claim (Count II)

The County Defendants move to dismiss Count II, arguing that it does not state a claim against them. The FCA's retaliatory discharge provision reads:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

31 U.S.C. § 3730(h). The County Defendants argue that plaintiff cannot state a claim under § 3730(h) be-

cause she does not allege that she was employed by the County.

Plaintiff does not allege sufficient facts from which the court can infer that the County Defendants were her employers. Plaintiff alleges that Hektoen hired her as the New Start project director on October 1, 1993, that she was employed by Hektoen, and that Prochaska, Hektoen's administrator, ultimately fired her. Although plaintiff alleges that Dr. Mason, an employee of CCH, removed medical and childcare matters from plaintiff's responsibilities as project director, these allegations do not prove that CCH was plaintiff's employer.

At best, plaintiff alleges that Dr. Mason conspired with Hektoen to retaliate against plaintiff. The County Defendants cite a well-reasoned district court case holding that § 3730(h) liability cannot be extended to nonemployers on the basis of a conspiracy. *See Mruz v. Caring, Inc.*, 991 F.Supp. 701, 709 (D.N.J.1998). The court agrees that the plain language of § 3730(h) "reflects a legislative intent to operate exclusively in the area of the 'employment relationship.'" *Id.* at 708. Although plaintiff argues that Cook County should be liable for the acts of its employees whether or not they are key decisionmakers, she does not establish as an initial matter that Cook County or any of its employees were her "employer" under the plain language of the statute. The County Defendants' motion to dismiss Count II is granted.

D. Motion to Dismiss State Law Retaliation Claim (Count III)

The County Defendants move to dismiss Count III of plaintiff's complaint, arguing that plaintiff cannot state a claim for retaliatory discharge under Illinois law. The County Defendants also move to strike from Count III plaintiff's request for punitive damages against them. Be-

cause the court has found that plaintiff cannot state a retaliatory discharge claim and that she does not allege that the County Defendants employed her, the County Defendants' motions are granted.

CONCLUSION

The court denies Hektoen's and the County Defendants' motions to dismiss Count I on the ground that the FCA's qui tam provisions are unconstitutional. The court likewise denies the County Defendants' supplemental motion to dismiss Count I against them on the ground that they are not suable "persons" under the FCA.

The court grants the County Defendants' motion to dismiss CCH because Cook County is the appropriate defendant in this action. Because plaintiff does not allege that she was employed by the County, the court grants the County Defendants' motion to dismiss Count II against them. Finally, the Court grants Hektoen's and the County Defendants' motions to dismiss Count III because plaintiff does not allege that her discharge violated clearly established Illinois public policy.

The court declines to stay discovery pending Cook County's appeal of the court's immunity decision. This case is already two years old. Moreover, this case will proceed against Hektoen regardless of the outcome of an appeal by the County. Even if the County were not a party to this suit, the documents plaintiff requests would be subject to subpoena, and as a non-party the County would have no claim of immunity.